IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79 - 410

DONALD SCHANBARGER,

Petitioner,

V

MARINE MIDLAND BANK (Executor of the Harriet Hendry Estate),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DEPARTMENT APPELLATE DIVISION OF THE NEW YORK STATE SUPREME COURT

PETITIONER'S REPLY

Donald Schanbarger

Salem, New York 12865

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Petitioner's Reply

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PETITIONER'S REPLY

The respondent has not questioned the facts of the case as represented by the petitioner, petitioner suggusts that sum-

mary reversal is now in order.

The respondent assurts in substance that this Court doesn't have jurisdiction. The major thurst of the questions presented by the petitioner is upon law and facts against the state judiciary as to whether there was a fair court. A fair tribunal is basic requirement of Due process (In Re Murchison, 349 US 133). The original questions as present to this Court were prepared at the hearing and offered at the hearing before the petitioner (objector) rested his case, where he was told by the Surrogate to submit them by filing them, to which the respondent by Mr. Manley so stipulated, which respondent could submit a reply, which was not done. After the above procedure was directed and before the end of the hearing Donald Schanbarger

he would fram the questions as he saw fit and would not be limited to times after April 23, 1979. The Surrogate said "We are concerned only with the constitutional questions from the date of decree of April 23, 1976 to date and the Court will not consider nothing prior to that time, so be guided accordingly."

N.Y.S. civil practice limits presented questions to 2 pages (CPLR Rule 5528), requires every court to take judicial notice of the federal constitution (CPLR Rule 4511), construction of the CPLR shall be construed to secure just, speedy and inexpensive determination (CPLR sec. 104), and the N.Y.S. Court of Appeals is limited to matters of law in this case (N.Y.S. Constitution, Art. 6, sec. 7).

The Surrogate's Decree (at Pet. A 10) & Opinion (Pet. A 27) found there were

no constitutional violation of rights in answer to the questions presented to this Court, and such Decree was unanimously affirmed (Pet. A 58) by the 4th Dept. Appellate Div. of the N.Y.S. Supreme Court. It appears that the N.Y.S. judiciary had supported the procedure of raising the constitutional questions as directed by the Surrogate and agreed to by Mr. Manley, who now objects to the procedure. Such objection should not now be considered.

The presented questions could be considered as an amendment to the objections to the account.

Petitioner's question #2 by its nature could not reasonably be assurted until during the hearing. # 1 & # 3 could have been assurted before the hearing or after the Decree or opinion was issued by mov-

ing for re-argument and claiming suprise that the Court found that an appeal stays a civil order past appellate proceedings, expenses incurred thru negligence of executor was charged to legatee(s) or estate, and the Court had not taken consistant positions in the case. However with a talkative Surrogate it was obvious what he would do, so there didn't seem to be good reason to wait for the obvious to happen, but to promptly assurt constitutional constraints upon the Court's conduct in the record at the hearing when the Court could change its course at its hearing. It appears that the failure of the appellate courts to support this petitioner in the past had increased his boldness in approving wrong doing of the executor. Any motion for re-argument would had been repetitious and not had

any change in the conduct of the Surrogat, and a waste of time & expense.

It would seem if there is a fair court there would not be any need of assurtion of constitutional rights. The executor has the record show by its testimoney at the hearing that the supplemental account reflects interest from April 23, 1976 (date of first Decree) thru March 7, 1978. That leaves around one year of estate interest that is not accounted for, but the last Decree approves income tax payments for the tax year the executor denies account includes. What becomes or became of one years interest must be called an unseemly question.

Should this Court find that members of the N.Y.S. judiciary have willfuly and/or in a concerted manner elected to deny the petitioner of any constitutional

right secured by the 10th & 14th amendments, then there is surely a "special and important reasons" for granting a writ of certiorari to review an Order issued without federial or state grounds.

We quickly come to the question as to how to enforce any constitutional right determined by the U.S. Supreme Court as to what state courts can and/or cannot do. Let use say that a legatee has limitless Constitutional right to examine the opponent into matters of intent of mind if it is an issue of a case, and a court refuses to take such evidence. Would failure to file a text book of assurt rights before trial preclude such? Should a person bring on a special independant motion after trial assurting such a right, or should right assurtion be at a hearing when a court could change its

ascrew characteristic?

The proceedure that was used to raise the consitutional questions was the idea and direction of the Surrogate as agreed to by the respondent and complied with by the petitioner, thus the issue of jurisdiction of this court is without merit.

The remaining question seems to be if this Court finds the conduct of the courts below to be of significance and/or outrageous enuf to justify reversal of the order below in part or whole.

Petitioner urges this Court accept all facts stated herein should they not be challenged within 10 days of service.

Submitted by

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October 31, 1979